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IN THE

Supreme Court of The United States

OCTOBER TERM, 1967

No. 1227

ROBERT L. STRAUSS,

Petitioner,

vs.

T. RALPH GRIMES, Sheriff of Fulton County, Georgia,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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T. RALPH GRIMES, Sheriff of Fulton County, Georgia,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in the above-entitled case on November 22, 1967, rehearing of which was denied December 7, 1967.

CITATIONS OF OPINIONS BELOW

The decision of the Supreme Court of Georgia is reported at 223 Ga. 834, 158 S.E.2d 404, and is set forth at pages 154-159 of the certified record herein, and as well in appendix, infra, pp. 1-4. Denial of a petition for rehearing appears in the record at R. 165.

JURISDICTION

The judgment of the Supreme Court of Georgia affirming the lower court's denial of a petition for writ of habeas corpus in the Superior Court of Fulton County, Georgia, was entered November 22, 1967, and denial of rehearing was entered December 7, 1967. On March 6, 1968, Mr. Justice Black entered an order extending the time for filing Petition for Certiorari, to March 16, 1968.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted, at all stages of this habeas corpus proceeding, a deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1) Whether the petitioner established a prima facie case of racial exclusion from Georgia juries, in violation of the Fourteenth Amendment when,

a) The process of jury selection from racially designated sources was substantially the same, or considerably worse, than that condemned in *Whitus v. Georgia*, 385 U.S. 545; and,

b) The resulting disproportion of eligible Negroes to Negroes on the jury, is greater than that shown in *Whitus* and other cases following.

2) Whether petitioner, as a white man, may complain of purposeful exclusion of Negroes from Georgia juries, either

a) Because such exclusion presumes harm; or,

b) Because the State purposefully and willfully injected the Negro racial issue into the proceedings below.

3) Where juries have been selected by methods condemned in principle, by this Court, for at least twelve years prior to the return of the indictment herein,

a) Is any issue of retroactivity present; and,

b) If such issue is present, is the rule of *Whitus* to be given retrospective application?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) This case involves the Fourteenth Amendment to the Constitution of the United States.

2) This case also involves §§59-106, 59-201, 92-6302 and 92-6307 of the Georgia Code (see App. 5-6, et seq.).

STATEMENT

Petitioner was originally indicted in 1964 by the Fulton County Grand Jury on a five-count indictment charging violation of the Georgia Securities Act, Code §97-112(b). He was tried in October, 1966, found guilty, and sentenced to fifteen years imprisonment, and has been held in jail, without bond, since the conclusion of the trial.

He took a timely appeal of his conviction to the Court of Appeals of Georgia, which dismissed the appeal, sua sponte, *Strauss v. State*, 116 Ga.App. 154, 156 S.E.2d 543, and the Supreme Court of Georgia denied certiorari in an unreported order.

After dismissal of petitioner's appeal, he filed in the Superior Court of Fulton County, Georgia, a petition for

habeas corpus (R. 12, et seq.), drawn under the provisions of the newly enacted Georgia Habeas Corpus Act of 1967, Ga.L. 1967, 835, Code §50-101, et seq.[1].

In this habeas corpus, petitioner, for the first time, asserted that the grand jury which returned the indictment, and the Petit Jury which convicted him, had been made up and constituted on an illegal and unconstitutional basis—the very basis which had been condemned in *Whitus*, and in subsequent decisions. The case came on for hearing before the Superior Court, at which time testimony was taken and exhibits introduced.

Proof Adduced

At the hearing, the petitioner proved the following facts: He was indicted by the November-December 1964 Grand Jury of Fulton County, Georgia (R. 12, 15, 35, 41). The grand jury that returned the indictment was taken from a venire (R. 98), Exhibit 5 (R. 141) which was, in turn, prepared from the "1962-1963 Jury List" (Exhibit 4 (R. 140, 97). At the time Exhibit 4 was made up, it is unquestioned that Georgia was governed by the statutory sections which are set forth as an Appendix to this petition, (App. 5-6)[2].

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[1]This new law granted Superior Courts in Georgia, habeas corpus powers intended to be co-existent with those exercised by Federal courts.

[2]This Court recently summarized the then applicable procedure for selecting grand and petit jurors as follows:

"Georgia law requires that the six commissioners appointed by the Superior Court 'select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets'. Ga.Code Ann. §59-106. They are also directed to select from this group a sufficient number, not exceeding two-fifths of the whole number, of

The venire of seventy-five names from which the grand jury was taken contained the names of only two Negroes (R. 107).

Petitioner also introduced statistical data from official United States census data from 1960 (R. 104), and computerized data from the F[illegible]n County Tax Digest for 1962 (R. 128, 86; Exhibit 3, 129-138, 87). The evidence adduced at the hearing is summarized by the following table:

STATISTICAL TABLE—FULTON COUNTY GRAND JURORS

1960 Census Figures — Population Age 21 and over — Fulton County

Total Males	155,900 =	100%
White Males	108,019 =	69.3%
Colored Males	47,881 =	30.7%
Total Males & Females	339,058 =	100%
All Whites	231,045 =	68.14%
All Negro	108,013 =	31.86%

1962 Tax Digest Recap (Exhibit 3)

White Taxpayers	161,192 =	85.01%
Colored Taxpayers	27,537 =	14.99%

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the most experienced, intelligent, and upright citizens to serve as grand jurors, writing their names on other tickets. The entire group, excepting those selected as grand jurors, constitutes the body of traverse jurors. The tickets on which the names of the traverse jurors are placed are deposited in jury boxes and entered on the minutes of the Superior Court. Ga. Code Ann. §§59-108, 59-109. The veniremen are drawn from the jury boxes each term of court and it is from them that the juries are selected." *Whitus v. Georgia*, 385 U.S. 545, 548 (1967).

November - December 1964 Fulton County Grand Jury Venire

White	73
Colored	2
% Male Population over 21 (Colored)	30.7%
% of 1962 Tax Digest (Colored)	14.99%
% of 1964 Grand Jury Venire (Colored)	2.7%

Witness Howard M. Hargis, Sr., testified that he had been one of six jury commissioners picked in 1962 to revise the jury list and that the 1962 list was selected from 170,000 tax returns from which 37,477 petit jurors were picked and from that list, 3,913 grand jurors were placed in the "Grand Jury Box" (R. 63-64). The list was prepared from copies of tax returns.

These copies were, admittedly, of *different colors* for white and Negro taxpayers, and the commissioner well knew which was which.

The tax returns also showed, on their face, the race of the taxpayer.

This commissioner testified that he did not use the Tax Digest itself. On cross-examination, Hargis denied that he had systematically excluded any Negroes from jury service (R. 69), but he also indicated rather strongly that he would consider a Negro only if he wrote in "a good hand" and returned property[3]. He had no other informa-

[3] "Q Did you try to get any particular portion of Negro on the jury?

A We did, and the jury list will show we did.

Q In what basis did you approach it?

A From the tax return. If they wrote a fairly good hand, if they returned any property, why we would entertain their name and would put them on there." (R. 70)

tion, except the tax return or his personal acquaintance (R. 71).

Witness Schukraft, another jury commissioner, confirmed the use of the different colored tax returns in making up the 1962 jury lists. He did not recall which color of return represented which race (living in and out of the city), but he testified:

> "I don't remember exactly what it was but we knew what was colored and we knew what was white." (R. 76).

Schukraft also confirmed that no reference was made to the Tax Digest itself (R. 78). This witness denied that he excluded any jurors on account of race and stated that he made some effort to get white and Negro people (R. 78-79), jews and women on the list. He knew of no figure in existence as to the percentage or proportion of Negroes on either the grand jury or the petit jury. The witness further testified that to his knowledge there had never been a Negro jury commissioner in Fulton County (R. 80).

Witness Barrett was an employee of the Fulton County Tax Department. He testified that during the applicable period there were four different colors of tax returns; blue and white for white persons living outside and inside of the city of Atlanta, respectively; pink and green for colored persons living inside and outside the city of Atlanta, respectively (R. 85).

Each of these returns showed the race and sex of the taxpayer (R. 85).

The witness also identified a page of the Tax Digest (R. 86, Exhibit 2, R. 128), and the Tax Digest Recap (R. 87, App. Exhibit 3, R. 129), whereby the race of each taxpayer could readily be identified by a symbol prepared by a computerized accounting system.

Witness Stephens (R. 90, et seq.) was a director of data processing for Fulton County. He gave further testimony as to Exhibit 3, the Tax Digest Recap (R. 129). In this recap there was a breakdown of the number of tax returns received by white, Negro inside city, outside city, and also the number of tax bills prepared on the same basis. He also testified as to the existence of a "defaulters digest" (R. 93). However, this latter compilation did not figure in the preparation of the jury list, although the racial tabulation therein was readily identifiable (R. 94, 96).

Up to January 1, 1967, the State of Georgia required this witness to segregate the tax digest by race (R. 94).

Lillian Witcher was the jury clerk of Fulton County. She identified petitioner's Exhibit 4 (R. 97, 139, et seq.) as the Revised 1962 Jury List from which the grand and petit jury venire here in issue was selected. Grand jurors were identified by asterisks (R. 98). She further testified that the 75-name venire for the November-December 1964 was drawn by Judge Moore from slips containing the asterisk names in petitioner's Exhibit 4 (R. 98). These were the names that were placed in the box (R. 101).

There was no question that the grand jury which returned the indictment herein consisted of 23 of the venire of 75 (R. 98).

The witness knew nothing as to percentages of Negroes on any of the lists, although she said she had seen Negroes on the juries (R. 103).

Witness Hobbs, a lawyer, introduced population statistics (R. 104) and testified as to arithmetical computations made from the exhibits in evidence and testimony. The gist of his testimony is summarized in the "Statistical Table".

There was no dispute as to this witness testimony that the venire of 75 grand jurors contained but two Negroes, and that the grand jury itself contained but one (R. 107).

Testifying in his own behalf, petitioner identified himself as a white male citizen in custody. He denied having, in any manner, waived any rights in connection with the challenge to the grand and petit juries raised in these proceedings (R. 111).

On cross-examination, petitioner identified himself as a contributor to, but not a member of, the NAACP. He also stated that the race issue had been raised at the time of the trial—in fact, by the very opening statement to the jury by the Assistant County Solicitor, Sparks (R. 112-114)[4].

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[4]Relevant portions of the text of said opening statement taken from the original trial record, with appropriate emphasis, are included as an Appendix to this brief. This record was before the Georgia Supreme Court in connection with its denial of certiorari from the dismissal of the original appeal.

How the Federal Questions Were Raised and Decided Below

The Georgia Habeas Corpus Act of 1967 (Code §50-101 et seq.) provides for jurisdiction in the Superior Courts of the State of Georgia for any person imprisoned under a state sentence

> " * * * who asserts that in the proceeding which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States * * * ."

The petition for writ of certiorari brought under this act in the Superior Court of Fulton County, Georgia, alleged that the petitioner's detention was unconstitutional because the method of selection of the grand jury which indicted him, and the petit jury which convicted him, was in violation of the due process of law and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States (R. 13). This was the only question raised in said petition.

After entertaining the petition on its merits, and receiving evidence, the Superior Court entered an order dismissing the same and remanding the petitioner to custody on the grounds, inter alia, that Negro citizens were not systematically excluded from juries in Georgia (R. 40-41); that as a white man the petitioner could not show any harm to him by any discrimination against Negroes in juries (R. 41); that petitioner had no right to have any percentage of Negroes on juries (R. 42); and that the application of this Court's *Whitus* decision would have such serious impact upon the administration of justice in

Georgia that it should not be applied retroactively, regardless of the showing made (R. 43-44).

On direct appeal, the Supreme Court of Georgia specifically declined to pass upon the merits of the constitutional questions (R. 156)[5], and held that this Court's decision in *Whitus* would not be applied "retroactively" to the facts shown in the case sub judice.

On petition for rehearing (R. 161), the petitioner urged that such a ruling was necessarily contrary to this Court's actions in *Whitus v. Balkcom*, 370 U.S. 728, 82 S.Ct. 1675, 8 L. Ed.2d 803 (1962). Rehearing was denied without opinion (R. 165).

REASONS FOR GRANTING THE WRIT

I. The Judgment Below is in Direct Conflict With This Court's Decision in Whitus v. Georgia, 385 U.S. 545, and Cases Following.

A. A prima facie case of discrimination was made.

It cannot be seriously questioned that the petitioner's claims of discrimination in the selection of the Fulton County Grand Jury in 1964 are identical to those decided by this Court in *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599; *Jones v. Georgia*, U.S. , 88 S.Ct. 4, L.Ed.2d (1967); *Cobb v. Georgia*, U.S. , 88 S.Ct. 115, L. Ed.2d (1967); *Sims v. Georgia*,

[5] "Under our view of the case, we do not reach the claim of unconstitutional selection of the grand jury." 223 Ga. 834, 835, S.E.2d .

U.S. , 88 S.Ct. 523, L.Ed.2d (1967); and *Anderson, et al v. Georgia*, 329 Misc., U.S. , (Decided March 5, 1968). See also, *Bostick v. South Carolina*, 386 U.S. 361, 87 S.Ct. 1088, L.Ed.2d (1967), reversing 145 S.E.2d 439.

Indeed, the process of juror discrimination demonstrated in the case at bar is more flagrant than in any of the decisions above cited, and more closely resembles the "yellow card" practice condemned as early as 1952, in *Avery v. Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1952).

It will be recalled that in *Whitus v. Georgia*, supra, the Court condemned a process of jury selection similar in design and operation to that proved in the case at bar. However, in *Whitus*, and also *Cobb*, supra, the jury lists were made up from Tax Digests, wherein the race of the taxpayer was indicated, solely, by a letter ("W" for white, "C" for colored). In the case at bar, the evidence is undisputed that the jury selection was made *directly* from the tax returns, which were of different color for different races (R. 68).

Therefore, whatever opportunities and temptations for discrimination were present in *Whitus*, *Cobb*, *Jones* and *Sims*, were made physically easier in the case at bar. A jury commissioner need not even study small print to discover the race of a prospective juror and, indeed, unless he were suffering from daltonism, he would instantly be able to determine the race by just glancing at the color of the paper. That the different colors were intermixed, seems to petitioner's counsel to be a distinction without a difference, since the commissioners would have the identical oppor-

tunity for discrimination—except that they could accomplish it with more dispatch. It is our view that the contrasting colors would be equally, or more, obvious than separate piles. Essentially this is the same practice condemned in the cases decided both this term and last, and, indeed, it reaches back, in principle, to *Avery*.

The opportunities for discrimination are clear. Not only are the commissioners instantly aware of the race of any prospective juror, but, at least one of the commissioners indicated that he applied different standards to prospective Negro jurors than to prospective white jurors: Jury Commissioner Hargis testified that he would consider a Negro juror if—and presumably only if—he "wrote a fairly good hand and returned any property" (R. 70). There is no evidence whatsoever that similar standards of calligraphy or affluence were applied to any white jurors.

The only other standard testified to by any commissioner was personal knowledge (R. 71), and there is no evidence that the particular witness knew any Negroes.

No Negro had ever served as jury commissioner (R. 80).

A comparison of the opinion in *Whitus*, supra, with the table contained on page 5 of this petition, will reveal that the disparity between colored males, colored taxpayers, and colored grand jury veniremen is much greater in the case at bar than in *Whitus*, where it was held that such disparity made a prima facie case of purposeful discrimination. In *Whitus* the disparity was between 27.1% for the tax digest and 9.3% on the grand jury venire; whereas,

in the case at bar, the comparable figures are, respectively, 14.99% and 2.7%.

This Court, using the statistical techniques outlined by Finkelstein[6], observed that the chance probability that 9.3% would appear on a venire where 27.1% of the tax digest were Negroes would be a mathematical probability of .000006.

We represent to this Court that applying the same formulae to the disparity in the case at bar would give a mathematical probability which would consist of a decimal point followed by seven zeroes.

The magnitude of the prima facie showing of purposeful discrimination made by the petitioner can also be shown in the following way: We herewith reproduce a portion of the opinion of the Court in *Jones v. Georgia*, U.S. , 88 S.Ct. 4, L.Ed.2d (1967), beside which we have included, in a ruled box, the comparable figures for the case at bar:

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[6]Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv.L.Rev. 338 (1966).

	"WHITUS"	"PETITIONER'S CASE [Jones]"	STRAUSS'S CASE
"Over 21 Population	42% Negro men	30% Negro	30.7% Negro
"Jury Commissioners	White (apparently)	White	White
"Source of Juror Names	Tax Digest separated and identified as to race	3 Tax Digests, two of which separated and identified as to race	Tax Returns —Race identified by color of return and by use of symbol "W" for white and "C" for colored
"Taxpayers "Negro Jurors	27.1% Negro 9.3% grand jury venire 7.8% petit jury venire	20% Negro 5% of jury list and box (1 Negro was on the grand jury which indicted petitioner	14.99% Negro 2.7% (One Negro on grand jury list which indicted Strauss
"Rebuttal Evidence by State	None	None"	None

The state has no more explained this overwhelmingly unlikely disparity than it did in *Whitus*, *Cobb*, or *Jones;* and this failure of explanation in each of those cases has been the basis for reversal.

B. The petitioner, a white person, is entitled to constitutionally selected grand or petit juries, particularly when Negro racial issue was injected into trial by state.

The opinion of the Georgia Supreme Court was specific in that it did not

" * * * reach the claim of unconstitutional selection of the grand jury." (App. 3)

However, the opinion of the trial court, whose judgment the Supreme Court of Georgia affirmed, bottoms its actions, in a large measure, upon a finding that the petitioner, as a white man, was not harmed and could not complain of the systematic exclusion of Negroes from juries (R. 39, 41, 43).

While this concept would, at first glance, appear to have formed no part of the *ratio decidende* of the Georgia Supreme Court, that court's two references to the petitioner as a "white man" impels petitioner, out of caution, to meet this point.

We submit, therefore, that any "semble" decision by the Georgia Supreme Court that a defendant cannot complain of systematic exclusion of a class from juries, unless he is a member of the class excluded, is directly contrary to this Court's holding in *Ballard v. United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181, and cases from other jurisdictions following the same.

In *Ballard*, supra, this Court decided that a male defendant in a criminal case was entitled to challenge the systematic exclusion of women from California federal juries (where women were eligible and required to serve) [7].

[7] "But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84, or

Other courts, including a court in Georgia, have—we think, correctly—interpreted this case as standing for the general proposition that

> "A departure from the statutory scheme which 'deprives the jury system of the broad basis it was designed by Congress to have in our democratic society' may be asserted by any litigant, even though he is not a member of the excluded class." *Rabinowitz v. United States*, 366 F.2d 54 (CA 5, 1966).

See, also, *Allen v. State*, 110 Ga.App. 56, 137 S.E.2d 711 (1954), *Cobb v. Balkcom*, 339 F.2d 95, 98 (1964), *United States v. Hunt*, 265 F.Supp. 178 (WD Texas, 1967).

A decision that the petitioner could not complain of jury discrimination solely because of his race would not only be in conflict with *Ballard*, supra, but would place the courts in a position of approving a "reverse racism" in which Negro defendants would have rights not available to white defendants. Surely the Equal Protection clause of the Fourteenth Amendment would forbid this type of discrimination, as much as it would the more familiar kind.

In the case at bar, however, there is considerably more than the presumptive harm resulting to the petitioner from

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an economic or social class, Thiel v. Southern Pacific Co., *supra*, deprives the jury system of the broad base it was designed by Congress to have in our democratic society. It is a departure from the statutory scheme. As well stated in United States v. Roemig, D.C., 52 F.Supp. 857, 862, 'Such action is operative to destroy the basic democracy and classlessness of your personnel.' It 'does not accord to the defendant the type of jury to which the law entitles him. It is an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to him.' * * * ." 67 S.Ct. 261, 265.

jury discrimination. He showed *actual* harm. Here, it cannot be disputed that the State tried—with apparent success—to inject the racial issue into the trial. In his very opening statement, the Assistant County Solicitor of Fulton County, Georgia, made a great point of bringing out that the petitioner (in the operation of his money order companies) was dealing with an all *Negro* bank in Virginia, and a *Negro* bank in Atlanta (R. 113)[8]. These remarks were obviously an appeal to the coarsest kind of prejudice against people who deal, or do business, with Negroes. If such remarks were passed in open court with all present, the mind reels to suppose what went on in the ex parte privacy of the grand jury.

II. Decision Below Misconstrues Law of Retroactivity and is Necessarily in Conflict with This Court's Ruling in *Whitus v. Balkcom*, 370 U.S. 728.

The Supreme Court of Georgia did not reach the merits of the petitioner's claims of jury discrimination because it decided that *Whitus v. Georgia*, supra, would not be given what that court characterizes as "retroactive application" (App. 3). In so holding, we submit that the Georgia court decided this important federal question in a way probably not in accordance with the applicable decisions of this Court and, in particular, the earlier de-

[8]The exact words of the prosecutor were: "I expect to show you further that these money orders were clearing through the Crown Savings Bank in Newport News, Virginia, and I expect to show you that it is an all or was an all Negro bank. * * * I expect to show you that the money order companies had established an account in a local bank here, the Citizens Trust Company, which is also a Negro bank here in Atlanta, * * * ." (App. 8, 9).

cisions involving the same defendant — *Whitus v. Balkcom*, 370 U.S. 728, 82 S.Ct. 1675, 8 L.Ed.2d 803 (1962).

The Supreme Court of Georgia cited four recent decisions in which the court declined to apply landmark decisions relating to criminal procedural matters to cases decided prior to the date of such decisions[9]. However, each of those decisions involved *changes* in existing law enforcement procedures, and at least two of these decisions involved the specific overruling of prior decisions of this court[10].

We believe, however, that the concept of retroactivity has no place in the case at bar, since *Whitus v. Georgia*, supra, did not change existing law or overrule any precedent, but was only a continued application of decades of authority. Indeed, as this Court so carefully pointed out in *Whitus v. Georgia*, supra, discrimination against Negroes, or any other class of persons, in the selection of state juries, has been held violative of the Fourteenth Amendment since 1880, in *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664, and the principle has been several times reiterated, *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); *Pierre v. Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed 757 (1939). Further, this Court found that the circumstances struck down in *Whitus* were "akin" to those condemned in *Avery v. Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed 1244 (1953). Subsequently, in *Williams v. Georgia* 349 U.S. 375, 75 S.Ct. 814, 99 L.Ed

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[9] *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 15 L.Ed. 2d 601; *Tehan v. Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed. 2d 453; *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882; *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 19 L.Ed.2d 1199.

[10] *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1648, 6 L.Ed.2d 1081; and, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

1161 (1955), this Court made clear that what it was condemning in *Avery* was the "system of selection" and not any particular method by which it was carried out.

Thus considered, it is plain that *Whitus* made no change in law enforcement procedures or established any "new" line of authority, but was merely a case of applying time-honored and established principles to discriminatory techniques which had become slightly more covert. This Court's opinion in *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), relied upon by the Georgia court does, in fact, show, by its distinguishing of other cases, that no concept of "retroactivity" is involved in circumstances such as those in the case at bar:

> "It is urged, however, that these same considerations apply in the cases that we have applied retrospectively in other areas, notably that of coerced confessions, and that the Mapp exclusionary rule should, therefore, be given the same dignity and effect. Two cases are cited, Faye v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) and Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961), but neither is apposite. It is said that we ordered new trials 25 years after conviction in the latter and after the lapse of 21 years in the former. This time table is true but that is all. The principle that a coerced confession is not admissible in a trial predated the arrests as well as the original convictions in each of these cases. See Brown v. State of Mississippi, 297 U.S. 278, 56 S. Ct. 461, 80 L.Ed. 682 (1936). *There was no question of*

retrospective operation involved in either case." (Emphasis supplied.)

At least eleven years before *Whitus v. Georgia*, supra, the States, in general, and Georgia in particular, had been told that any trick, device, or arrangement of colored papers which had the effect of deliberate exclusion of a segment of the population from criminal juries was constitutionally intolerable, *Avery v. Georgia*, and *Williams v. Georgia*, supra. To hold the *Whitus* decision inapplicable to the case at bar because of a concept of "retroactivity" would not only distort the useful principles of retrospective *versus* prospective application, but would also encourage any state officials, who were so inclined, to engage in an interminable hare-and-hounds contest with this Court. It is obvious that the subtleties which may be employed to bring about the *result* of purposeful exclusion are as infinite as human imagination. If the reasoning followed by the Supreme Court of Georgia were to be approved by this Court, the important principle in *Whitus v. Georgia*, supra, would be whittled away to an intolerably narrow factual base, and a premium would be placed upon the ingenuity of the various evasions which might be devised by state officials inclined to perpetuate the old abuses.

We submit that this danger alone makes the case at bar worthy of the Court's consideration, notwithstanding the Georgia court's assurance that the method of jury selection has been changed. It was changed after *Avery* in 1952, but the old abuses continued. Viability can be given to this Court's *Whitus* principle only by striking down this conviction which resulted from this discredited practice.

It must be recalled that the system about which *Whitus* was complaining in his *original* habeas corpus was the *same* system about which the petitioner is now complaining. We would go further and urge this Court that, completely apart from *Whitus*, the conflict of the judgment below with *Avery* and *Williams* would be an adequate reason for granting of the writ and correction of the abuse. We think it is most likely that it was these precedents that the Court had in mind at the time of its per curiam reversal in *Whitus v. Balkcom*. In all events, the principle was sufficiently well established to require reversal when it was first raised in federal habeas corpus. See also, *Whippler v. Dutton*, __F.2d__ (CA 5, N° 24428, decided February 7, 1968) wherein the Court of Appeals for the Fifth Circuit apparently assumed the non-existence of any retroactivity question.

III. If Question of Retroactivity is Present, Rationale of Recent Cases Requires Retrospective Application of Whitus.

Assuming, *arguendo*, that any choice was present between retrospective and prospective application of the *Whitus* doctrine, we submit that the Georgia Supreme Court's rejection of retrospective application is probably not in accordance with the applicable decisions of this Court.

The most recent decision of this Court treating the problem of retroactivity is *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 19 L.Ed.2d 1199 (1967), in which new rules as to "line-up" identification were held not to be applicable to earlier cases. In so deciding, the Court set forth the

guidelines to be applied in determining the manner of application of a new rule:

> " * * * 'These cases establish the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective * * * where the exigencies of the situation require such an application" * * * .' *Johnson*, supra, 384 U.S., at 726-727, 86 S.Ct., at 1777. The criteria guiding resolution of the question implicates (a) the purpose to be served by the new standards, (b) *the extent of the reliance by law enforcement authorities on the old standards*, and (c) the effect on the administration of justice of a retroactive application of the new standards. '[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background or precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.'." 87 S.Ct. at 1969-1970. (Emphasis supplied.)

Earlier in this petition we have denied that *Whitus* presented any "new" rule within the meaning of this language. Even, however, if it be considered a new standard, we think that the application of the Court's criteria above cited would require that the general principle of retrospective interpretation be followed.

With respect to criterion a), the purpose of the *Whitus* rule is to correct what the Court characterized as "the evil" (385 U.S. 545, 552) resulting from a "system of selection" which arbitrarily discriminated against a race or class of people. This new standard (which seems to petitioner very much like the old standard) may be "new" only in that it tends more to measure purposeful discrimination by the *results*, as seen in the jury box, rather than by the particular scheme of discrimination employed. It seems to us, therefore, that the purpose of *Whitus* (and the cases following it) was to place once and for all this Court's stamp of disapproval upon any method of jury selection which *resulted* in the exclusion of any eligible segment of the population from juries, or produced juries which were less than a fair cross-section of the community.

If *Whitus* is narrowed to a prospective application to the particular method there involved, the Court's purpose might well be thwarted. The prosecuting authorities might well devise new methods which would accomplish the old result, secure in the knowledge that prosecutions gained by such methods would be undisturbed.

Criterion b) —the extent of reliance by the authorities on the old standards— requires no elaborate argument. We know of no decision by this Court, or any other court, which —at least for the last fifteen years— could have lead the Georgia law enforcement authorities to believe that they were justified in discriminating against Negroes, or any other segment of the population, in selection of any grand or petit juries. Indeed, every indication that this Court gave, and especially *Avery* and *Williams*, should have compelled the opposite conclusion. No constitutional authority ever told the officials of Georgia that they could

purposefully exclude Negroes or include them only in token numbers.

This concept is sharply to be distinguished from cases such as *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). That case overruled the prior controlling decision of this Court, *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), upon which prosecuting authorities would certainly have been entitled to rely. Likewise *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) struck down the statutory privilege of commenting on the failure of the accused to testify —which had not theretofore been challenged by this Court.

Escobedo and *Miranda*[11] impliedly overruled *Crooker v. California*, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958) upon which law enforcement officials were justifiably entitled to rely.

Finally, there is criterion c) —the "effect on the administration of justice". We do not think that this standard refers to the expressed fears by the Georgia Supreme Court of a mass legalized jailbreak. We think that this Court had in mind the right of prosecuting authorities to rely upon apparently valid procedures considered in connection with any inherent unreliability in the discredited procedure. Applying this standard to the case at bar, we submit that the administration of justice would best be served by giving the *Whitus* rule retroactive application.

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[11] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694. *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977.

In the first place, as we have argued, there was nothing to justify Georgia authorities' supposing that they could continue systematically to exclude Negroes from juries, no matter how this was accomplished. To hold otherwise might well invite a reliance by Georgia officials on some new method of selection which would, nevertheless, accomplish the unlawful result.

The reluctance of Georgia courts to follow *Whitus* (see *Jones v. State*, 223 Ga. 157, 154 S.E.2d 228 (1967) would indicate that a definitive remedy is necessary to accomplish the constitutional result; otherwise five years from now this Court may, again, be presented with the complaints of racially imbalanced juries in Georgia. Retroactivity (if necessary) is, clearly, the method finally to prevent this from occurring.

Additionally, we feel that the exclusion of Negroes from juries in a case in which the state has injected the racial issue, does, indeed, affect the integrity of the fact finding process, within the meaning of *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908. That is to say, a racially imbalanced grand jury and petit jury, when coupled with at least one appeal to racial prejudice which can be proved by the trial record, does, in our view, create serious doubt that the indictment was returned by, and the trial was had before, the type of jury to which the Constitution entitled the petitioner.

As to the Georgia Supreme Court's fears that a hoard of white thieves, swindlers and felons would be set loose by application of the *Whitus* rule, we can only remind this Court of its statement that

" * * * we regard the fact that the parties in-

volved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." 87 S.Ct. 1967, at 1972.

This Court judicially knows that the administration of criminal justice has improved to an unprecedented degree by retroactive application of new principles in cases such as *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; *McNerlin v. Denno*, 378 U.S. 575, 84 S.Ct. 1933, 12 L.Ed.2d 1041 (1964; and *Eskridge v. Washington State Prison Board*, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958). See also, *Swenson v. Donnell*, 382 F.2d 248 (CA 8, 1967) (wherein the Eighth Circuit decided that the rule of *Douglas v. California*, 372 U.S. 353, would be retroactive).

We doubt seriously that retroactive application would open the doors of jails in Georgia, since each defendant would have to carry the burden of proving an actual exclusion of some class of population, see *White v. McHan*, 386 F.2d 817 (CA 5, 1967). There may not have been discrimination in cases wherein the jury commissioners had performed their duty constitutionally, regardless of the make up of the tax digest.

We submit, however, that the retroactive application of *Whitus* —if required— is the only method by which this controversy, once and for all, may be put to rest.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

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APPENDIX

SEPTEMBER TERM, 1967.

24391. STRAUSS v. GRIMES, Sheriff.

The trial court properly denied the appellant's petition for habeas corpus claiming unconstitutional composition of the grand jury which indicted him.

ARGUED NOVEMBER 15, 1967—

DECIDED NOVEMBER 22, 1967—

REHEARING DENIED DECEMBER 7, 1967.

Habeas corpus. Fulton Superior Court. Before Judge Pharr.

Harold Karp, Arthur Cunningham, Philip Weinstein, for appellant.

Lewis R. Slaton, Solicitor General, J. Robert Sparks, Carter Goode, J. Walter LeCraw, for appellee.

GRICE, Justice. Denial of a petition for habeas corpus, in which the petitioner claimed that the grand jury which indicted him was unconstitutionally composed, is the subject matter of this appeal. The petition was instituted by Robert L. Strauss against T. Ralph Grimes, as Sheriff of Fulton County, in the Superior Court of that county. Strauss had been indicted by the grand jury of the county for violation of the Georgia Securities Act, found guilty, and sentenced to 15 years imprisonment.

Petitioner, insofar as necessary to recite here, asserted

that he, a male white citizen, had not been accorded the type of grand jury to which the law entitles him in that it was not impartially selected from a cross section of the community. He claimed that it was drawn from a grand jury box illegally constituted because the jury commissioners used as their starting point a prior jury list from which Negro citizens of the county had been systematically excluded or disproportionately included, and also because the commissioners in completing the jury box used tax returns where taxpayers were segregated by race. He urged that this denied him due process of law and equal protection of the law, and that he had not waived his right to a constitutionally selected grand jury.

The respondent denied the essential allegations of the petition.

Upon the hearing the petitioner presented testimony as to the grand jury selection procedures and statistics with reference to numbers and percentages of whites and Negroes, seeking to bring the case within the ambit of Whitus v. Georgia, 385 U. S. 545 (87 SC 643, 17 LE2d 599), and other such decisions of the Supreme Court of the United States, upholding claims of systematic exclusion of Negroes from grand and petit juries. The jury commissioners in the case at bar explained the selection procedures employed here and denied any purposeful or intentional discrimination.

The trial court's judgment dealt adversely with each of the petitioner's contentions and remanded him to the custody of the respondent. The appeal is from that judgment.

Under our view of the case, we do not reach the claim of unconstitutional selection of the grand jury.

We do not believe that retroactive application of the Whitus case, 385 U. S. 545, supra, is required in the present case, where the grand jury indictment was returned December 22, 1964, and no challenge was made to the composition of the grand jury at the time of the trial, but was first made in a post conviction habeas corpus proceeding.

The Supreme Court of the United States has not made retroactive application of the Whitus principle to a situation where the attack on the grand jury was made after conviction. Those cases applying Whitus (Cobb v. Georgia, 389 U. S. 12 (88 SC 115, 19 LE2d 11); Jones v. Georgia, 389 U. S. 24 (88 SC 4, 19 LE2d 25); and Bostick v. South Carolina, 386 U. S. 479 (87 SC 1088, 18 LE2d 223)), dealt with attacks made before trial.

Furthermore, that court has ruled that four other standards for criminal investigations and court proceedings, recently established for the first time by it, should not be applied retroactively. They relate to (1) search and seizure in Mapp v. Ohio, 367 U. S. 643 (81 SC 1648, 6 LE2d 1081), held not retroactive in Linkletter v. Walker, 381 U. S. 618 (85 SC 1731, 14 LE2d 601); (2) comment on failure to testify in Griffin v. California, 380 U. S. 609 (85 SC 1229, 14 LE2d 106), held not retroactive in Tehan v. Shott, 382 U. S. 406 (86 SC 459, 15 LE2d 453); (3) confession without benefit of counsel in Miranda v. Arizona, 384 U. S. 436 (86 SC 1602, 16 LE2d 694, 10 ALR3d 974), held not retroactive in Johnson v. New Jersey, 384 U. S. 719 (86 SC 1772, 16 LE2d 882); and (4) "line up"

identification in United States v. Wade, 388 U. S. 218 (87 SC 1926, 18 LE2d 1149), and Gilbert v. California, 388 U. S. 263 (87 SC 1951, 18 LE2d 1178), held not retroactive in Stovall v. Denno, 388 U. S. 293 (87 SC 1967, 19 LE2d 1199). Since the impact of those principles upon the administration of criminal justice was deemed such as to preclude retroactive application, surely the impact of the claim here—a white man's contention that the indictment was void because Negroes were systematically excluded from the grand jury which indicted him—also warrants the denial of such application.

The observations that retroactive application in such situations would "seriously disrupt the application of our criminal laws" (Johnson v. New Jersey, 384 U. S. 719, supra) and "would have a serious impact" upon the area affected (Stovall v. Denno, 388 U. S. 293, supra) are understatements indeed. If so applied, every convicted murderer, rapist, robber, thief, swindler, and all other felons of the white race, no matter how long ago indicted and convicted, could make the same claim and possibly be set free, unless again indicted and convicted. Due to inaccessibility of witnesses and their failing memories as to essential facts, hordes of such criminals would be turned loose upon society.

It should be added that in response to the criticism in the Whitus case, 385 U. S. 545, supra, decided January 23, 1967, Georgia acted promptly. By an Act approved March 30, 1967, it radically changed the method of grand and petit jury selection. Ga. L. 1967, p. 251.

Judgment affirmed. All the Justices concur.

GEORGIA STATUTORY PROVISIONS

Code §59-106. Revision of jury lists. Selection of grand and traverse jurors. — Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 60 days thereafter, the board of jury commissioners shall revise the jury lists.

The jury commissioners shall select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright citizens to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead.

Code §59-201. Qualifications of Grand Jurors; incompetency of certain public officers to serve. — All citizens of this State, above the age of 21 years, being neither idiots, lunatics, nor insane, who have resided in the county for six months preceding the time of serving, and who are the most experienced, intelligent, and upright persons, are qualified and liable to serve as grand jurors, unless exempted by law: Provided, however, that county commissioners, tax receivers, tax collectors, members of the county board of education, county school commissioners, ordi-

naries, and county treasurers shall be incompetent to serve as grand jurors during their respective terms of office.

Code §92-6302. Lists for tax returns; incorporation and arrangement of questions. — It shall be the duty of the State Revenue Commissioner when he causes to be printed the lists which are to be presented to the taxpayer, to incorporate therein the questions provided in section 92-6215, and to so arrange them as to require a separate answer to each question. He shall include any other question in said lists which in his judgment will cause a fuller return of and reach property subject to taxation under the laws of this State, and shall omit from said lists such questions as are more explicitly covered and set forth in this Title.

Code §92-6307. Entry on digest of names of colored persons. — The tax receivers shall place the names of the colored taxpayers, in each militia district of the county, upon the tax digest in alphabetical order. Names of colored and white taxpayers shall be made out separately on the tax digest.

EXCERPTS FROM THE OPENING STATEMENT BY THE PROSECUTION AT THE ORIGINAL TRIAL OF THIS CAUSE

OPENING STATEMENT BY MR SPARKS (COUNSEL FOR THE STATE):

Lady and gentlemen of the jury, my name is Bob Sparks, and I am the Assistant Solicitor General who will

be presenting this case to you. This is an opening statement as to what the State expects to prove in the case, and I want to warn you that it is not evidence, and it will not be construed as evidence by you. I find that it generally helps the jury and the jury can follow the evidence a little bit better, if the Solicitor General at the outset of the case will give you a brief outline of what he expects to prove. I won't attempt to go into it in detail, and I will only try to hit the high spots. And again, as I say, I will attempt to prove what I shall state to you in my opening statement; however, my statement here is not testimony. And you will take the testimony from the witnesses as they testify from the stand. I might have some inaccuracy in my opening statement, because, as you have probably gathered already, this is a most extremely complicated case. So don't hold me too closely to the exact language of what I am telling you the State expects to prove in the case. The evidence will come from the stand and not from me and not from the defense counsel either.

You have heard the indictment read to you, and it is a lengthy indictment, and it sets out pretty much in detail the alleged scheme the State is going to prove to you or attempt to prove to you. However I do want to point out just a few things. I am not going to attempt to cover in detail the lengthy indictment

[04403]

Discount Company and several other corporations in which Mr Strauss was financially interested and which he and Mr Townsend controlled and operated. I expect to show you that these overdraft balances on each of those sheets added up to hundreds and thousands of dollars for each

day. And the State will rely upon that in great degree to show personal knowledge on the part of Mr Strauss that for several months that the accounts were vastly overdrawn, and that he was operating a check kite.

I expect to show you further that these money orders were clearing through the Crown Savings Bank in Newport News, Virginia, and *I expect to show you that is an all or was an all Negro bank.* I expect to show you that the man, the cashier of that bank, a man named Frank Dallas Jackson, was receiving money from Mr Strauss sent through the mail. I expect to show you that once a week for twelve weeks he received one hundred dollars a week from Mr Strauss in envelopes bearing the return address of Federal Mortgage and Discount Company, which was Mr Strauss' office. Mr. Strauss and Mr Townsend were operating out of the same office. I expect to show you that those were mailed to Frank Dallas Jackson at a post office box in Newport News, Virginia. And Frank Dallas Jackson is charged as a defendant in this case, but I expect to, or I will state to you now that the Solicitor General of Fulton County has granted immunity from prosecution in this case to Frank Dallas Jackson, and he will appear as a witness to testify as to his dealings with Mr. Strauss. (Emphasis Supplied)

[04406]

thereby caused that account to be overstated in that amount, in other words, it showed that in the Crown Savings Bank that there was two hundred and twenty-two thousand dollars more than there was actually on deposit there.

I expect to show you too [sic] that Mr Frank Dallas Jackson, the cashier of the bank up there, had daily conversations with Mr Strauss, that he would call Mr Strauss daily or Mr Strauss would call him daily from Atlanta, and he would tell Mr Strauss how much money was needed to clear the money orders which were arriving that day. For example, you need forty-two thousand dollars deposited to clear, we have got forty-two thousand dollars worth of money orders here that we have got to clear today, to pay.

I expect to show you that the money order companies had established an account in a local bank here, the Citizens Trust Company, which is *also a Negro bank here in Atlanta*, in the name of the Crown Savings Bank, and they were ostensibly making their deposits locally there, and then by debit memorandum they could transfer it to the account, debit or credit memoranda they could transfer it to the account up in Newport News.

I expect to show you that when Mr Jackson would call Mr Strauss and tell him that you need so much money to cover the money orders, Mr Strauss would tell him, well, I am going to make a deposit this afternoon. I expect to show you that Mr Jackson would then call the Citizens Trust, the Citizens Trust here in Atlanta and say, have the money order companies made a deposit to (Emphasis Supplied)

[04409]

Strauss vs. *State of Georgia;* Supreme Court,

Case No. 24298

CERTIFICATE OF SERVICE

IT IS HEREBY certified that two true and correct copies of the within and foregoing Petition for Writ of Certiorari, and Appendix, have been mailed by prepaid airmail to the Hon. LEWIS R. SLATON, Solicitor General, Fulton Judicial Circuit, Fulton County Courthouse, Atlanta, Georgia, and two additional copies have been mailed by prepaid airmail to the Hon. ARTHUR K. BOLTON, Attorney General of the State of Georgia, 132 Judicial Building, Atlanta, Georgia, this ..... day of March, 1968.